

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GENGHIS KHAN ALI

Case No.: 15-cv-1926-DMS-MDD

STEVENSON,

**REPORT AND
RECOMMENDATION OF
UNITED STATES
MAGISTRATE JUDGE RE:
PETITION FOR WRIT OF
HABEAS CORPUS**

Petitioner

V.

JEFFREY BEARD

Respondent

This Report and Recommendation is submitted to United States District Judge Dana M. Sabraw pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the Southern District of California.

For the reasons set forth herein, the Court **RECOMMENDS** the Petition be **DISMISSED**.

1 **I. PROCEDURAL HISTORY**2 **A. Federal Proceedings**

3 Genghis Khan Ali Stevenson (“Petitioner”) is a state prisoner
 4 proceeding *pro se* and *in forma pauperis*. (ECF Nos. 1, 4).¹ On August
 5 26, 2015, Petitioner constructively filed a Petition for Writ of Habeas
 6 Corpus pursuant to 28 U.S.C. § 2254 against Jefferey Beard
 7 (“Respondent”). (ECF No. 1). Petitioner claims that: (1) the procedure
 8 used by the California Department of Corrections to calculate his time-
 9 served credits was misapplied, effectively extending his sentence and
 10 thereby violating his Due Process and Equal Protection rights; (2) his
 11 trial counsel failed to bargain for fifty percent time-served credits; and
 12 (3) the Court should grant him an evidentiary hearing. (*Id.* at 5-7).

13 On December 21, 2015, Respondent filed an Answer,
 14 Memorandum of Points and Authorities in support thereof, and state
 15 court lodgments. (ECF Nos. 11, 11-1, 12). On January 21, 2016,
 16 Petitioner filed a Traverse. (ECF No. 13).

17 **II. BACKGROUND FACTS**

18 In 2001, Petitioner was convicted of robbery with use of a firearm
 19 in violation of California Penal Code § 211. (ECF No. 1 at 19; Lodg. 1).
 20 Petitioner was sentenced to fourteen years with an expected release
 21 date in July 2014. (ECF No. 13 at 1 ¶ 1). Petitioner was eligible for a
 22 fifteen percent time-served credit on his robbery sentence. (ECF No. 1
 23 at 19).

24

25 ¹ Pagination refers to the CM/ECF document not the native
 document.

1 On February 28, 2006, Petitioner pled no contest to a charge of
 2 custodial possession of a weapon in violation of California Penal Code §
 3 4502(a). (*Id.* at 31). Petitioner was convicted and sentenced to six years
 4 as a second striker under California's three strikes law, California
 5 Penal Code §§ 1170.12(a)-(d), 667(b)-(i). (*Id.* at 19, 22, 26, 31). This six-
 6 year term was to run consecutively with Petitioner's fourteen-year
 7 robbery sentence. (*Id.* at 32). In May 2006, Petitioner filed petitions for
 8 writ of habeas corpus in state and federal court challenging the
 9 possession conviction by asserting ineffective assistance of counsel.
 10 (ECF No. 13 at 5 ¶ 6). Both the state and federal petitions were denied.
 11 (*Id.*).

12 Petitioner states that every time he gains or loses time-served
 13 credits in prison, he receives a "Legal Status Summary Sheet" which
 14 advises him of the time-served credits accrued towards his sentence.
 15 (*Id.* at 5-6 ¶ 7). Petitioner attaches the June 2, 2014, Legal Status
 16 Summary showing the "credit rate" for the possession conviction as "2nd
 17 Striker 20%/33.3%" and refers to the "*Tate* decision."² (ECF No. 1 at
 18 32).

19 In December 2012, Petitioner states that he passed the General
 20 Education Exam and therefore believed he was eligible for "Milestone
 21 Completion Credits" entitling him to six weeks of credit. (ECF No. 13
 22 at 6 ¶ 8). Petitioner was advised that although he may not be eligible to
 23 apply those six weeks to his prior robbery sentence, he may be able to
 24 apply them towards his possession sentence. (*Id.*).

25 ² *In re Tate*, 135 Cal. App. 4th 756 (2006).

1 In January 2013, Petitioner was informed of the time-served
2 credits he was eligible to receive. (*Id.* ¶ 9). Petitioner states that the
3 case records manager was confused because there were conflicting
4 documents in his record that stated differing time-served credit
5 percentages for his possession sentence. (*Id.*). Petitioner asserts that
6 some documents listed fifty percent and others twenty percent. (*Id.*).
7 On January 9, 2013, Petitioner filed an inmate appeal seeking
8 clarification of his time-served credit percentage and also to exhaust his
9 administrative remedies so that he could seek judicial review of his
10 time-served credit calculation. (*Id.*; Lodg. 3 at 27).

11 On January 17, 2013, Petitioner's First Level Appeal was partially
12 granted for the purposes of exhausting administrative remedies. (Lodg.
13 3 at 32). The First Level Response found that Petitioner was only
14 entitled to twenty percent time-served credit for his possession sentence
15 and that Petitioner's calculated release date was May 17, 2019. (*Id.* at
16 30).

17 Petitioner appealed, and on March 7, 2013, his Second Level
18 Response was partially granted because a "Computation
19 Review/Haygood Hearing" was held.³ (*Id.* at 33-34). Petitioner was
20 again advised that he was only eligible for twenty percent time-served
21 credit on his possession sentence, and that his calculated release date
22 was May 17, 2019. (*Id.*). Petitioner states he sought a calculation of his
23 Earliest Possible Release Date ("EPRD") in March 2013, and that he
24 was notified during the Computation Review/Haygood Hearing on
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³ *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985).

1 March 7, 2013, that he was only eligible for twenty percent time-served
2 credit for his possession sentence. (ECF No. 1 at 6-7).

3 Petitioner appealed, and on July 15, 2013, his Third Level Appeal
4 was denied. (Lodg. 3 at 29). The Third Level Response affirmed both
5 the calculation of Petitioner's EPRD of May 17, 2019, and Petitioner's
6 twenty percent time-served credit eligibility for his possession sentence.
7 (*Id.*). Petitioner thus exhausted his administrative remedies. (*Id.* at
8 31).

9 On October 18, 2013, Petitioner filed a petition for writ of habeas
10 corpus in Imperial County Superior Court. (Lodg. 3 at 17). Petitioner
11 argued that based upon *In re Tate*, he was eligible for day-to-day (fifty
12 percent) time-served credit for his possession sentence. (*Id.* at 18). The
13 court found that Petitioner's twenty percent time-served credit
14 eligibility was accurate because Petitioner was sentenced under the
15 three strikes law for his possession offense. (*Id.* at 19). The court
16 distinguished *In re Tate* on the grounds that, unlike Petitioner, Tate
17 had entered into a plea agreement not governed by the three-strikes
18 law. (*Id.*). On November 7, 2013, the superior court denied the petition.
19 (*Id.* at 18).

20 On January 22, 2014, Petitioner filed a second habeas petition
21 with the California Court of Appeal. (Lodg. 1). Petitioner again argued
22 he was entitled to day-to-day time-served credit under *In re Tate*. (*Id.*).
23 On February 11, 2014, the Court of Appeal denied the petition on the
24 merits. (Lodg. 3 at 16). The Court of Appeal found that Petitioner was
25 sentenced under the three strikes law and was only eligible for twenty

1 percent time-served credit. (*Id.*). The court distinguished *Tate* because,
 2 unlike Petitioner, Tate had bargained for the day-to-day time-served
 3 credit under the negotiated plea. (*Id.*).

4 On June 10, 2014, Petitioner filed a third petition with the
 5 California Supreme Court. (Lodg. 2). Petitioner raised the same
 6 arguments regarding the calculation of his time-served credits as his
 7 prior state habeas petitions. (Lodg. 3 at 10-11). On August 13, 2014,
 8 the California Supreme Court denied the petition without comment or
 9 citation. (*Id.* at 7).

10 In his Traverse, Petitioner claims that between January 2013 and
 11 August 2015, the prison where he is incarcerated had intermittent
 12 lockdowns of various lengths. (ECF No. 13 at 6-7 ¶ 10). Petitioner
 13 alleges “[there] [were] over five major lockdowns that lasted over two
 14 months, over ten minor lockdowns that last[ed] two weeks and
 15 countless 24-hour lockdowns.” (*Id.*). Petitioner asserts that during
 16 these lockdowns he did not have “Priority Legal User” status, which
 17 denied him priority access to the law library, legal materials and legal
 18 mailing. (*Id.* at 14). Petitioner states that non-Priority Legal Users
 19 were put into a lottery system for access during lockdowns, but often
 20 only Priority Legal Users were granted access, leading to the gaps in
 21 Petitioner’s state filings. (*Id.* at 14-15).

22 **III. SUMMARY OF ARGUMENTS**

23 **A. Petitioner’s Arguments**

24 In his Petition, Petitioner argues that the state courts misapplied
 25 the law to his time-served credits. (ECF No. 1 at 5-7). In his Traverse,

1 Petitioner further argues that the Petition is timely under the Anti-
2 Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28
3 U.S.C. § 2244(d)(1)(D). (ECF No. 13 at 2). Petitioner argues that he
4 always believed that he was entitled to day-to-day time-served credits
5 for his possession sentence based upon Legal Status Summaries and
6 court documents he received. (*Id.* at 13). Petitioner asserts that he is
7 entitled to statutory tolling because he did not discover the factual
8 predicate underlying this Petition until March 2013, although he filed
9 an inmate appeal concerning the calculation of his time-served credits
10 in January 2013. (*Id.*). Petitioner further claims that he was unable to
11 file his first state habeas petition in superior court prior to October 2013
12 because he was transferred to another prison in August 2013 for a civil
13 trial and was not transferred back to his place of usual incarceration
14 until September 2013.⁴ (*Id.* at 14).

15 Petitioner also argues that the statute of limitations did not run
16 against him in the gaps between filing his state petitions because the
17 intervals between a lower court petition being denied and the filing of a
18 new petition in a higher court are considered within the statutory scope
19 of the word “pending,” and thus tolled AEDPA’s statute of limitations.
20 (*Id.* at 15).

21 Petitioner additionally argues that he is entitled to equitable
22 tolling because the intermittent prison lockdowns constituted
23

24 ⁴ Case No. 3:11-cv-103-LAB-EVG. In that action, Petitioner was
25 the plaintiff and pursued that action *pro se* through trial, disposition
and post-trial motions. (*Id.*).

1 circumstances that were beyond his control and which denied him
2 access to prison legal materials. (*Id.* at 16). Petitioner contends he
3 diligently pursued his legal rights despite these lockdowns. (*Id.*).

4 On the merits, Petitioner argues that the state courts violated his
5 Due Process and Equal Protection rights when they made unreasonable
6 determinations of fact regarding the determination of his time-served
7 credits. (*Id.*).

8 **B. Respondent's Arguments**

9 Respondent argues that Petitioner's claims are barred by
10 AEDPA's one-year statute of limitations, even if he is entitled to the
11 later start date of March 7, 2013, and considering that he is entitled to
12 some period of statutory tolling while his state petitions were pending.
13 (ECF No. 11-1 at 4, 6) Respondent bases this argument on the grounds
14 that: (1) seven months of untolled time elapsed between Petitioner's
15 discovery of the factual predicate of his claim on March 7, 2013, and the
16 filing of his first state petition in superior court on October 18, 2013; (2)
17 four months of untolled time elapsed between the denial of Petitioner's
18 state petition by the California Court of Appeal on February 11, 2014,
19 and the filing of his next state petition with the California Supreme
20 Court on June 10, 2014; and (3) a year of untolled time elapsed between
21 the denial of his last state petition by the California Supreme Court on
22 August 13, 2014, and the filing of this Petition on August 26, 2015. (*Id.*
23 at 4-6).

24 On the merits, Respondent argues that Petitioner's claims fail
25 because the time-served credit calculations performed by prison officials

1 were correct and did not violate any federal right. (*Id.* at 6-10).
2 Respondent contends that the state courts' correct interpretation of
3 state law precludes federal relief. (*Id.*).

4 **IV. STANDARD OF REVIEW**

5 Title 28, U.S.C. § 2254(a) provides the scope of review for federal
6 habeas corpus claims:

7 The Supreme Court, a Justice thereof, a circuit judge, or a
8 district court shall entertain an application for a writ of
9 habeas corpus in behalf of a person in custody pursuant to
10 the judgment of a State court only on the grounds that he is
11 in custody in violation of the Constitution or laws or treaties
12 of the United States.

13 As amended by AEDPA, 28 U.S.C. § 2254(d) provides:

14 (d) An application for a writ of habeas corpus on behalf of a
15 person in custody pursuant to the judgment of a State court
16 shall not be granted with respect to any claim that was
17 adjudicated on the merits in State court proceedings unless
18 the adjudication of the claim –

19 (1) resulted in a decision that was contrary to, or
20 involved an unreasonable application of clearly
21 established Federal law, as determined by the
22 Supreme Court of the United States; or

23 (2) resulted in a decision that was based on an
24 unreasonable determination of the facts in light of the
25 evidence presented in the State court proceeding.

26 Petitioner presented all of his claims in his federal habeas Petition
27 to the state trial, appellate and supreme courts on collateral review.
28 (Lodg. 3). The California Court of Appeal denied Petitioner's claims on
29 the merits. (*Id.* at 16).

1 **IV. DISCUSSION**

2 **A. Statute of Limitations**

3 AEDPA sets a one-year statute of limitations for all 28 U.S.C. §
 4 2254 habeas corpus petitions initiated by state prisoners after April 24,
 5 1996. *Shelby v. Bartlett*, 391 F.3d 1061 (9th Cir. 2004). Under §
 6 2244(d)(1)(D), “[t]he limitation period shall run from . . . the date on
 7 which the factual predicate of the claim or claims presented could have
 8 been discovered through the exercise of due diligence.” *Id.*

9 Respondent accepts March 7, 2013, as the date Petitioner
 10 discovered the factual predicate of his claim. (ECF No. 11-1 at 5; Lodg.
 11 1). AEDPA’s statute of limitations therefore began to run on that date.
 12 28 U.S.C. § 2244 (d)(1)(D). Petitioner did not file this Petition until
 13 August 26, 2015, more than two years after his claim arose. (ECF No.
 14 1). Absent tolling, this Petition is untimely.

15 **1. Statutory Tolling**

16 Under AEDPA, the one-year statute of limitations begins to run
 17 on the date on which the factual predicate of the claim or claims
 18 presented could have been discovered. 28 U.S.C. § 2244(d)(1)(D). “To
 19 accommodate any collateral state court habeas proceeding, however, the
 20 statute provides that the time during which a properly filed application
 21 for State post-conviction or other collateral review with respect to the
 22 pertinent judgment or claim is pending shall not be counted toward any
 23 period of limitation.” *Maes v. Chavez*, 792 F.3d 1132, 1134 (9th Cir.
 24 2015) (internal quotations and citations omitted).

1 Petitioner discovered the factual predicate of his claim on March
 2 7, 2013, triggering AEDPA's statute of limitations. 28 U.S.C. §
 3 2244(d)(1)(D). Petitioner did not file a state habeas petition until
 4 October 18, 2013. (Lodg. 1). Although Petitioner suggests he is entitled
 5 to statutory tolling during the time he was pursuing administrative
 6 remedies, AEDPA's statute of limitations is not tolled during the time a
 7 petitioner pursues administrative remedies. *See* 28 U.S.C. § 2244(d)(2)
 8 (providing statutory tolling only during the time period in which "a
 9 properly filed application for State post-conviction or other collateral
 10 review with respect to the pertinent judgment or claim is pending").

11 Petitioner asks the court to note that he was transferred to
 12 another prison for a federal civil trial, leading to the delay in filing his
 13 first state habeas petition.⁵ (ECF No. 13 at 14). However, that transfer
 14 does not give Petitioner any statutory tolling for that time period
 15 because only a properly filed petition in state court tolls AEDPA's
 16 statute of limitations, not a federal civil suit. 28 U.S.C. § 2244(d)(2).
 17 Therefore, seven months of untolled time elapsed between Petitioner's
 18 discovery of the factual predicate of his claim and the filing of his state
 19 petition in superior court.

20 Although Petitioner argues that he is entitled to gap tolling
 21 during the intervals between the filing of his state petitions, this
 22 argument fails. The Ninth Circuit reaffirmed that the reasonable
 23 benchmark for such gaps in filing is between thirty and sixty days.
 24 *Stewart v. Cate*, 757 F.3d 929, 935-36 (9th Cir. 2014). The Ninth
 25

⁵ Case No. 3:11-cv-103-LAB-WVG.

1 Circuit has consistently held that gaps between filings longer than sixty
2 days are not entitled to statutory tolling because there is no properly
3 pending petition in state court under 28 U.S.C. § 2244(d)(2). *See*
4 *Stewart*, 757 F.3d at 935-36 (finding no gap tolling for one hundred day
5 delay); *Stancle v. Clay*, 692 F.3d 948, 956 (9th Cir. 2012), cert.
6 denied, 133 S.Ct. 1465 (2013) (eighty-two days); *Velasquez v. Kirkland*,
7 639 F.3d 964, 968 (9th Cir. 2011), cert. denied, 132 S.Ct. 554
8 (2011) (eighty-one days); *Chaffer v. Prosper*, 592 F.3d 1046, 1048 (9th
9 Cir. 2010) (one hundred and one days). The California Court of Appeal
10 denied Petitioner's state petition on February 11, 2014, and he did not
11 file his next state petition in the California Supreme Court until June
12 10, 2014. (Lodgs. 2, 3). Over four months of untolled time elapsed
13 because there was no properly pending petition in state court under 28
14 U.S.C. § 2244(d)(2). When the untolled four-month gap is added to the
15 pre-filing seven-month gap, Petitioner had one month to timely file a
16 federal petition upon the conclusion of state judicial review.

17 Except for the four months which elapsed between Petitioner's
18 filings in the California Court of Appeal and the California Supreme
19 Court, AEDPA's statute of limitations was tolled for the period of time
20 Petitioner sought state judicial review. 28 U.S.C. § 2244(d)(2). On
21 August 13, 2014, state judicial review ended. (Lodg. 3). Petitioner then
22 had one month to timely file a federal petition, or until September 12,
23 2014, because eleven months of untolled time had previously elapsed
24 prior to the conclusion of state judicial review. Petitioner did not file
25 this Petition until August 26, 2015, more than eleven months after

1 AEDPA's statute of limitations had expired. Petitioner did not have a
 2 pending state habeas petition during the interval between August 13,
 3 2014, and August 26, 2015, and therefore an additional twelve months
 4 of untolled time elapsed prior to his filing this Petition. 28 U.S.C. §
 5 2244(d)(2).

6 Twenty-three months of cumulative untolled time elapsed
 7 between Petitioner's discovery of the factual predicate of his claim on
 8 March 7, 2013, and the filing of this Petition on August 26, 2015.
 9 Accordingly, Petitioner is not entitled to statutory tolling.

10 **2. Equitable Tolling**

11 Although Petitioner is not entitled to statutory tolling, the
 12 Petition can survive if he is entitled to equitable tolling. *Holland v.*
 13 *Florida*, 560 U.S. 631, 645 (2010).

14 "The threshold necessary to trigger equitable tolling under
 15 AEDPA is very high, lest the exceptions swallow the rule." *Mendoza v.*
 16 *Carey*, 449 F.3d 1065, 1068 (9th Cir. 2006). AEDPA's statutory period
 17 can be equitably tolled only when extraordinary circumstances are
 18 shown. *Holland*, 560 U.S. at 645. "A petitioner is entitled to equitable
 19 tolling only if he shows (1) that he has been pursuing his rights
 20 diligently, and (2) that some extraordinary circumstance stood in his
 21 way and prevented timely filing." *Id.* at 649 (citing *Pace v.*
 22 *DiGuglielmo*, 544 U.S. 408, 418 (2005)) (internal quotations omitted). A
 23 habeas corpus petition can "be timely, even after the one-year time
 24 period has expired . . . [if] equitable tolling applies." *Jorss v. Gomez*,
 25 311 F.3d 1189, 1192 (9th Cir. 2002). The burden rests with the

1 petitioner to demonstrate he is entitled to equitable tolling. *Pace*, 544
2 U.S. at 418.

3 In his Traverse, Petitioner alleges that between January 2013 and
4 August 2015, he was denied access to legal materials because of
5 intermittent lockdowns of various lengths and also because of his
6 transfer to another prison for his *pro se* civil trial. (ECF No. 13 at 6, 14-
7 15). Petitioner claims he was often denied access to legal materials
8 during these lockdowns because he was not a Priority Legal User and
9 had to go through a lottery system which often denied him access. (*Id.*
10 at 14-15.). Petitioner gives no indication of how long such denials
11 lasted.

12 **a. Diligence**

13 “The diligence required for equitable tolling purposes is
14 reasonable diligence not maximum feasible diligence.” *Holland*, 560
15 U.S. at 653 (citing *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996) and
16 *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2010)) (internal
17 quotations omitted). To preserve his claim, Petitioner must show that
18 he “diligently” pursued his legal interests in the year that elapsed
19 between the California Supreme Court’s final judgment and the filing of
20 this Petition. *Id.* at 649.

21 Petitioner does not state what he did to pursue his legal rights
22 during the untolled periods. Petitioner offers nothing to show his
23 diligence in those intervals, except the threadbare allegation that he
24 “diligently pursued his claim.” (*Id.* at 6). Although Petitioner filed an
25 Application with the Ninth Circuit in March 2015, that filing came

1 nearly seven months after the denial of his petition by the California
 2 Supreme Court and over five months after AEDPA's statute of
 3 limitations had expired. (Lodg. 3). Because Petitioner makes no
 4 showing that he did anything to diligently pursue his legal interests in
 5 those intervals, Petitioner fails to satisfy *Holland*'s diligence prong.

6 **b. Extraordinary Circumstances**

7 "To apply the doctrine in extraordinary circumstances necessarily
 8 suggests the doctrine's rarity, and the requirement that extraordinary
 9 circumstances stood in [Petitioner's] way suggests that an external force
 10 must cause the untimeliness, rather than . . . mere[] oversight,
 11 miscalculation or negligence on the petitioner's part, all of which would
 12 preclude the application of equitable tolling." *Waldron-Ramsey v.*
 13 *Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009), cert. denied, 558 U.S.
 14 897 (2009).

15 Complete denial of access to legal materials is considered an
 16 "extraordinary circumstance." *See Lott v. Mueller*, 304 F.3d 918, 925
 17 (9th Cir. 2002) (finding eighty-two day denial of legal materials during
 18 temporary transfers in addition to uncertainty of the finality of state
 19 proceedings during the AEDPA period met extraordinary circumstance
 20 requirement). A habeas petitioner should "receive an evidentiary
 21 hearing when he makes a good faith allegation that would, if true,
 22 entitle him to equitable tolling." *Roy v. Lampert*, 465 F.3d 964, 969 (9th
 23 Cir. 2006) (quoting *Laws v. Lamarque*, 351 F.3d 919, 919 (9th Cir.
 24 2003)) (internal quotations omitted).

25

1 Petitioner claims he was subject to intermittent lockdowns of
2 various lengths which caused him to have to utilize a lottery system to
3 access legal materials, which often resulted in a denial of access and
4 therefore, constitutes extraordinary circumstances beyond Petitioner's
5 control. (ECF No. 13 at 6-7, 14-15). Petitioner alleges that these
6 intermittent lockdowns occurred between January 2013 and August
7 2015. (*Id.* at 6).

8 Petitioner also cannot satisfy *Holland*'s extraordinary
9 circumstance prong. Between January 2013 and August 2015,
10 Petitioner successfully exhausted his administrative remedies, filed a
11 state habeas petition and pursued that action to its end in August 2014,
12 pursued a *pro se* civil suit he had filed in 2011 through trial in 2013 and
13 beyond⁶ and filed an Application with the Ninth Circuit in March 2015,
14 demonstrating he had ample access to legal materials despite the
15 claimed intermittent lockdowns. (Lodg. 3; ECF No. 13 at 14).

16 If Petitioner was concerned about preserving his legal rights in
17 federal court, he could have filed a defective pleading in federal court
18 and then sought a stay and abeyance pending exhaustion of the state
19 judicial proceedings to preserve his legal rights. *See Irwin v. Dep't. of*
20 *Veterans Affairs*, 498 U.S. 89, 96 (1990) (observing that courts "have
21 allowed equitable relief in situations where the claimant has actively
22 pursued his judicial remedies by filing a defective pleading during the
23

24 _____
25 ⁶ The docket for Case No. 3:11-cv-103-LAB-WVG shows that
Petitioner was able to successfully file documents in this action between
March 2013 and April 2014. (*Id.* at ECF Nos. 69, 124).

1 statutory period"); *see also Pace*, 544 U.S. at 416 (stating "a petitioner
2 trying in good faith to exhaust state remedies may litigate in state court
3 for years only to find out at the end that he was never properly filed,
4 and thus that his federal habeas petition is time barred . . . [but] [a]
5 prisoner . . . might avoid this predicament . . . by filing a protective
6 petition in federal court and asking the federal court to stay and abey
7 the federal habeas proceedings until state remedies are exhausted")
8 (internal quotations and citations omitted). Petitioner did not do so.

9 If Petitioner was able to successfully file legal documents
10 repeatedly in both state and federal court for multiple actions in the
11 same time period despite the claimed intermittent lockdowns, he was
12 able to timely file a habeas petition in federal court even if it would
13 have been defective at the time of filing. Petitioner also makes no
14 showing that any of the claimed lockdowns and denials of access
15 occurred between August 13 and September 12, 2014, the one month
16 period remaining after the conclusion of state judicial review in which
17 he could have timely filed a federal petition.

18 Because Petitioner has not shown he diligently pursued his legal
19 interests or that some extraordinary circumstance occurred in the
20 untolled periods that prevented timely filing, he has not met his burden
21 and is not entitled to equitable tolling under *Holland*.

22 Accordingly, the Court concludes that this Petition is barred by
23 AEDPA's one-year statute of limitations because Petitioner has not
24 demonstrated that he is entitled to statutory or equitable tolling.

25

1 Because the Court finds that this Petition is barred by AEDPA's
2 statute of limitations, the Court does not reach the merits of this
3 Petition. Accordingly, the Court **RECOMMENDS** that the Petition for
4 Writ of Habeas Corpus be **DISMISSED** with prejudice and without
5 leave to amend.

6 **V. CONCLUSION**

7 For the foregoing reasons, **IT IS HEREBY RECOMMENDED**
8 that the District Court issue an Order: (1) Approving and Adopting this
9 Report and Recommendation; and (2) **DISMISSING** the Petition with
10 prejudice and without leave to amend.

11 **IT IS HEREBY ORDERED** that any written objections to this
12 Report must be filed with the Court and served on all parties no later
13 than **April 15, 2016**. The document should be captioned "Objections to
14 Report and Recommendation." **IT IS FURTHER ORDERED** that any
15 reply to the objections shall be filed with the Court and served on all
16 parties no later than **April 22, 2016**.

17 The parties are advised that the failure to file objections within
18 the specified time may waive the right to raise those objections on
19 appeal of the Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455
20 (9th Cir. 1998).

21 **IT IS SO ORDERED.**

22 Dated: March 30, 2016



23
24 Hon. Mitchell D. Dembin
United States Magistrate Judge
25